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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
	)	CS Docket No. 95-61
Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming	)	

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JUN 30 1995
FEDERAL COMMUNICATIONS COMMISSION
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COMMENTS OF LIBERTY CABLE COMPANY, INC.

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No. of Copies rec'd 0+10
List A B C D E

June 30, 1995

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SUMMARY

There is less effective competition in the video marketplace today than there was last year. As a multichannel video programming distributor ("MVPD") competing directly with a cable monopolist, Liberty Cable Company, Inc. ("Liberty") regularly encounters anticompetitive barriers which have hindered its ability to effectively compete in the video marketplace and which have frustrated the growth of any real competition.

Liberty's experiences with Time Warner in New York City illustrate the anticompetitive environment created by cable operators. Among the anticompetitive practices with which Liberty has first-hand experience are the following: (A) the use of Commission processes by cable operators to slow down the issuance of Liberty's pending 18 GHz license applications and oppositions to its STA requests; (B) restrictions on Liberty's ability to access buildings to connect Liberty's service; (C) the selective offering of bulk rates; and (D) the use of disparaging and false statements regarding Liberty's service and personnel.

If alternate providers like Liberty are ever to effectively compete with cable operators, the Commission must take action to ensure that these anticompetitive practices are eliminated and competition is, thereby, fostered. Unfortunately, the Commission has missed opportunities to take consistently aggressive and timely action to provide relief from these anticompetitive trade practices. For example, while the Commission adopted regulations that require uniform rates and that define cable inside wiring, the regulations do not nurture competition. Specifically, the uniform rate regulations provide cable operators with too much flexibility

to continue their discriminatory pricing practices and, the definition of home wiring does not allow alternate providers to access easily the wiring in multiple dwelling units ("MDUs") in order to connect subscribers to competing systems.

Moreover, in some proceedings, the Commission has been unable to resolve issues in a timely manner thereby hindering competition. Indeed, Time Warner has used the Commission's delay in granting Liberty's STA requests for certain 18 GHz license applications as a means to destroy Liberty's ability to grow and compete in the marketplace. In addition, in the Commission's inside wiring proceeding, Liberty and others filed petitions in 1993 which are still pending. As long as this issue remains unresolved, cable operators will continue to block Liberty's efforts to gain access to subscribers residing in MDUs.

It is imperative that these types of issues be resolved and relief granted in a timely manner. It does little good to provide relief to competitors who are no longer in the market because they have fallen victim to anticompetitive practices.

Liberty believes that the Commission must be more assertive in encouraging the growth of competing MVPDs. A more proactive role by the Commission, today, will foster present and future competition in the marketplace.

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COMMENTS OF LIBERTY CABLE COMPANY, INC.

Liberty Cable Company, Inc. ("Liberty") is discouraged and frustrated by events that have transpired since the Commission submitted the 1994 Competition Report[1/] to Congress. During the past year, cable monopolists, like the Time Warner Cable Group ("Time Warner") have grown more aggressive in their efforts to thwart the development of competition. This increased aggressiveness has overwhelmed the Commission's ability to take proactive steps to nurture competition.

It is in this negative environment that Liberty responds to the Commission's Notice of Inquiry ("NOI") in the above-referenced proceeding. The NOI seeks information on: (i) the current state of competition in the video marketplace; and, (ii) the extent to which the conduct and practices of multichannel video programming distributors ("MVPDs") and programming vendors have changed since the Commission prepared the 1994 Competition Report. To illustrate some of the problems currently facing non-cable MVPDs, these Comments cite specific instances of (i) predatory practices of Time

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1/ Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, First Report, CS Docket No. 94-48, 9 FCC Rcd 7442 (1994) ("1994 Competition Report").

Warner and other cable operators, and their impact on the growth of competition; and, (ii) how the Commission's inaction has hindered the growth of viable competition to cable monopolists.

I. __Background__.

Liberty is a MVPD which is fighting for its economic survival. Liberty competes head-to-head with Time Warner, the entrenched cable monopolist in Manhattan, New York. Liberty primarily uses 18 GHz frequencies for the distribution of video programming and is a pioneer in the use of the 18 GHz band to provide video services. Liberty has built the largest 18 GHz microwave network in the United States.[2/] Liberty is also one of the first MVPDs to test video dialtone ("VDT") service and technology.[3/] While Liberty currently services approximately 28,000 subscribers at approximately 150 sites in the New York metropolitan area,[4/] Liberty's 18 GHz license applications have languished since January 9, 1995 because of Time Warner's abuse of Commission procedures to prevent Liberty

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[2/] __See__ __In the Matter of Amendment of Part 94 of the Commission's Rules to Permit Private Video Distribution Systems of Video Entertainment Access to the 18 GHz Band__, __Report and Order__, PR Docket No. 90-5, 68 RR 2d 1233 (1991).

[3/] __See__ __In the Matter of the Application of New York Telephone for Authority Pursuant to Section 214 of the Communications Act of 1934, as amended, to Construct, Operate, Own and Maintain Facilities and Equipment to Test Video Dialtone Service in Portions of New York City__, 8 FCC Rcd 4325 (1993).

[4/] Almost all of Liberty's subscribers live in multiple dwelling units ("MDUs") -- cooperatives, condominiums and rental apartment buildings. Liberty also provides services to several hotels in Manhattan.

from receiving FCC authorizations for additional licenses.[5] Time Warner has abused the Commission's procedures to literally stop Liberty in its tracks.

II. **Purpose of the 1992 Cable Act.**

As Liberty discussed last year in its Comments on the status of competition, Congress enacted the Cable Television Consumer Protection and Competition Act of 1992 (the "Act") to encourage emerging technologies such as multi-channel, multi-point distribution service, direct broadcast satellite and satellite master antenna television to compete with entrenched cable monopolists.[6] The Act was intended to "promote the availability to the public of a diversity of news and information through cable television and other video distribution media" and to "ensure that cable television operators do not have undue market power vis-a-vis video programmers and consumers".[7] However, Congress' vision of competition in the video marketplace has not been realized. Cable monopolists in New York and in other urban areas continue to quash any glimmer of competition under the assumption that the Commission will not intervene.

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[5] See discussion infra pp. 6 - 8.

[6] See Comments of Liberty in CS Docket No. 94-48 at 3-5.

[7] Pub. L. No. 102-385, 106 Stat. at 1460, 1463 (1992).

III. Liberty's Perspective on the Status of Competition in the Video Marketplace.

From any perspective, there is less effective competition in the video marketplace today than there was last year. For example, Time Warner dominates the New York City cable market through Time Warner Cable of New York City, Paragon Cable Manhattan, B-Q Cable, QUICS and Staten Island Cable. In New York City, the largest municipal franchisor of cable operators in the nation, Time Warner has approximately one million subscribers.[8] Time Warner's one million subscribers constitute more than 75% of the subscribers in the five boroughs of New York City and over 90% of the subscribers in the borough of Manhattan. Over the past year, Time Warner has increased the number of its subscribers in New York City by approximately 60,000. In comparison, Liberty only serves about 2% of the subscribers in New York City.[9] Since January of this year, the size of Liberty's subscriber base has remained essentially stagnant and its market share has actually declined.

For a consumer who wants high quality video service at the lowest price possible, Liberty's service is an attractive alternative to the services of Time Warner and other competitors. Liberty offers its basic service, which consists of 59 channels, to MDUs at a bulk rate of $15.00 per apartment, regardless of the number of television sets in that apartment. Liberty's competitors generally

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[8] Time Warner serves approximately ten million subscribers nationwide.

[9] Liberty also provides service to a handful of MDUs located in Northern New Jersey. Cablevision is a franchised cable operator in New Jersey with which Liberty competes.

charge twice as much -- around $27.00 - $38.00 per apartment (with higher rates if a subscriber has more than one television set) -- for similar services.[10/]

Indeed, an "I-Team" investigative report aired during the April 24, 1995 broadcast of WUPN's 10 o'clock news features interviews with several former Time Warner subscribers who have had positive experiences with Liberty's service.[11/] According to these consumers, Liberty offers a better picture and better service than Time Warner, all at a lower price. The report also describes how Time Warner customers, unlike Liberty customers, must rent a converter box and a remote control on a monthly basis. Aside from the cost savings of not needing a converter box, Liberty customers are able to tape a program on one channel while watching another and are able to utilize the numerous features of the television set's own remote control. These "consumer conveniences" are not available to Time Warner subscribers.

Notwithstanding the obvious advantages of its service, Liberty has been unable to make any significant inroads into the New York video marketplace for one primary reason -- Time Warner's continued and widespread use of anticompetitive trade practices.

[10/] Attached herewith as Exhibit A are promotional materials which compare the prices for Liberty's service with those of Time Warner and Cablevision.

[11/] Attached herewith as Exhibit B is a video cassette which contains this news report.

IV. Anticompetitive Practices in the Provision of Service, Pricing, Program Access and Property Access.

Time Warner, a vertically integrated cable operator, has and continues to engage in anticompetitive acts against Liberty. Described below are just a few examples of Time Warner's more egregious behavior -- many of which Liberty identified for the Commission last year -- that have stifled competition in the New York market: (A) the filing of petitions to deny Liberty's pending 18 GHz license applications and oppositions to its Special Temporary Authority ("STA") requests; (B) restrictions on Liberty's ability to access subscribers in MDUs to connect its service; (C) the selective offering of bulk rates; (D) restrictions on access to programming; (E) the use of disparaging and false statements regarding Liberty's service and personnel; and, (F) the filing of multimillion dollar lawsuits against MDU owners and others because they have subscribed or want to subscribe to Liberty's service. While each practice is troubling in its own right, viewed together, these actions seem to create a pattern of anticompetitive behavior whose sole purpose is to destroy Liberty and extinguish any flicker of competition.

A. 18 GHz License Applications.

Over the past six months, Time Warner has filed petitions to deny ("Petitions") virtually every one of Liberty's 18 GHz license applications. In its Petitions, Time Warner has argued, among other things, that Liberty is statutorily disqualified from holding 18 GHz licenses because it has failed to get a cable franchise in connection with certain MDUs interconnected by hardwire in New York.[12/] Time Warner has made these filings despite the fact that the constitutionality of the statutory provision that categorizes these systems as cable systems is sub judice before the Second Circuit and the Southern District of New York.[13/] Liberty has opposed these filings and has questioned the relevance and propriety of Time Warner's submissions.[14/]

Time Warner has used the institutional delays inherent in the Petitions to prevent Liberty from competing; until the Commission resolves the issues raised by the Petitions and grants the 18 GHz licenses, Liberty cannot add MDUs to its subscriber base. Last month, Liberty filed STA requests so that it could provide service to new subscribers while the Commission considered the merits of the Petitions. Not surprisingly, Time Warner opposed Liberty's STA requests. As of today, the STAs still have not been granted.

While Liberty will not argue the merits of the Petitions or its STA requests here, it is imperative for this proceeding that

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[12/] See, e.g., Time Warner's Petition to Deny or Condition Grant, In re Applications of Liberty Cable Co., Inc. for Private Operational Fixed Microwave Radio service Authorizations and Modifications, File Nos. 709332, 709426, 708779, 708780, and 708781 (filed Jan. 9, 1995).

[13/] Liberty Cable Company, Inc. v. City of New York, 94 Civ. 8886 (S.D.N.Y.).

[14/] Liberty has acknowledged to the Commission that it has inadvertently commenced service in certain instances without the proper FCC authorization. Liberty has also stated that it is conducting an internal investigation into the conditions and events leading to this unauthorized service. Notwithstanding these mistakes, Liberty believes that the Commission should, and can, provide ways for Liberty and other alternative MVPDs to make inroads into the video marketplace. See discussion infra pp. 15 - 17.

the Commission put Time Warner's Petitions in the proper context. At every turn, Time Warner abuses the Commission's processes to hinder Liberty's efforts to bring competition and lower prices to New York City video consumers. Here, the 60-90 day time frame typically experienced in the processing of 18 GHz applications is now subject to an open ended delay as a direct result of the Petitions. Some of the license applications have been pending since December 1994 -- over six months. Liberty cannot conduct its business under these circumstances. Time Warner recognizes that any interruption of Liberty's ability to expand its subscriber base will irreparably harm Liberty's reputation and business. Specifically, a number of Liberty's contractual obligations are imperiled as a result of the Petitions. Liberty's inability, or even perceived inability, to meet its contractual obligations to provide service will destroy its reputation and, therefore, its ability to grow and compete in the marketplace.

B. Property Access.

One very specific goal of the Act is to promote increased competition in the video marketplace by allowing potential competitors access to existing cable home wiring without destroying or modifying the interior of a subscriber's home. Congress' goal was to make it effortless for the subscriber to switch video service providers.[15/] However, as Liberty vividly described in its Comments last year, one of the most significant problems faced by

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[15/] See H.R. Rep. No. 628, 102d Cong., 2d Sess. at 118 (1992).

a potential competitor is gaining physical access to the building to effectuate the installation (and removal) of equipment and wiring.[16]

Liberty continues to face these hurdles. Specifically, after Liberty signs up new subscribers by soliciting dissatisfied Time Warner subscribers, Time Warner is generally and completely uncooperative in effectuating the connection of Liberty's service and the disconnection of Time Warner's service. Since the current cable home wiring rules give ownership of the inside wire to the subscriber only after termination of service, Time Warner's tactics often hinder Liberty's ability to accomplish the service transition. This, understandably, aggravates potential Liberty customers, many of whom ultimately decide that Liberty's lower priced services are not worth the time and effort of switching to Liberty.[17]

C. Pricing.

The Act requires cable operators to have a rate structure "that is uniform throughout the geographic area in which cable service is provided over its cable system".[18] However, both Time Warner and Cablevision continue to engage in selective predatory pricing and the offering of bulk rates designed to eliminate

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[16] See Comments of Liberty in CS Docket No. 94-48 at 16-18.

[17] This description of the problems Liberty encounters with home wiring barely scratches the surface. For a more complete description, see Liberty's filings in MM Docket No. 92-260.

[18] Act Section 3, Section 623(d) of the Communications Act of 1934.

Liberty from the marketplace. Liberty has previously provided the Commission with evidence of Time Warner's discriminatory and predatory pricing practices.[19]

Last year, the Commission adopted regulations requiring cable operators to offer uniform rates. The regulations provide that:

> Cable operators may offer different rates to multiple dwelling units of different sizes and may set rates based on the duration of the contract, provided that the operator can demonstrate that its cost savings vary with the size of the building and the duration of the contract, and as long as the same rate is offered to buildings of the same size with contracts of similar duration.[20]

However, Time Warner continues to circumvent both the spirit and the letter of the law by effectively offering bulk discounts only to those MDUs considering switching to Liberty's service. And, contrary to the regulations, Time Warner's selective offering of reduced rates does not appear to be cost justified, but is rather, a targeted, predatory response to Liberty's marketing efforts.

It has also come to Liberty's attention that Cablevision has offered a prospective Liberty MDU customer in New Jersey, Tower West 6050 Boulevard East ("Tower West"), a bulk rate service package resulting in a discount of over 50% to Cablevision's current rates.[21] To the best of Liberty's knowledge, Cablevision is offering this rate only to customers in buildings considering

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[19] See, e.g., Liberty's Opposition to Petition for Reconsideration in MM Docket No. 92-266 (filed July 21, 1993) at 5.

[20] 47 C.F.R. § 76.984.

[21] Attached as Exhibit C are materials used by Cablevision in its presentation to Tower West on May 12, 1995.

Liberty's service and, therefore, such behavior is unlawful under the Commission's uniform rate regulations.

D. Program Access.

The program access provisions are intended "to promote the public interest, convenience, and necessity by increasing competition and diversity in the multichannel video programming distribution market".[22] With respect to vertically integrated cable operators offering programming that is distributed by cable and not by satellite, Congress still has not provided competing MVPDs with any relief that would enable them to access such programming. Liberty's problems in this area are best illustrated by its experience with the New York One News service, a service originally produced by Time Warner for its New York City subscribers. After launching New York One News, Time Warner sold the program for carriage to other unaffiliated cable operators in the region (such as Cablevision which serves the Bronx and parts of Queens), yet denied the program to Liberty, its only direct competitor. Time Warner continues to promote aggressively the fact that New York One News is only available to its subscribers in New York City, and not to Liberty's subscribers.[23]

The distinction between program distribution mechanisms in the Act -- satellite versus cable -- is illogical. Indeed, an increas-

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[22] See Act Section 19, Section 628(a) of the Communications Act of 1934.

[23] See, e.g., page 2 of Exhibit D which is a letter that Time Warner sent to residents of Schwab House, an MDU in New York City.

ing number of the major cable operators have announced their intention to use terrestrial distribution systems for their region-specific programming. As the major operators cluster their systems in order to dominate entire regions and as cable operators and regional telephone companies rapidly escalate their deployment of fiber optic networks with virtually unlimited transmission capacity, it is no longer necessary to rely upon satellites to deliver video signals. As satellites become an increasingly inefficient means to deliver video signals, the current program access provisions of the Act will lose their effectiveness. The Commission should recommend that Congress close this loophole in the Act by making all programming accessible by competing MVPDs regardless of how that programming is distributed.

E. Disparaging and False Advertising.

Competition in Manhattan is also crippled by Time Warner's tactics in marketing its cable service. As the Time Warner April 1995 and June 1995 letters attached herewith as Exhibits D and E illustrate, Time Warner will not hesitate to falsely disparage Liberty in order to keep subscribers.[24/]

For example, Time Warner continues to deprecate SMATV technology by asserting that "Liberty's 'open air' system is susceptible to rain, snow and other weather conditions which cause signal

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[24/] Fortunately, not all consumers are fooled by Time Warner's marketing ploys. For example, attached herewith as Exhibit F is one consumer's response to Time Warner's April 1995 solicitation.

interference and degrade picture quality."[25] These claims are patently false.

Moreover, Time Warner routinely ambushes the character and reliability of Liberty.[26] Indeed, Time Warner's June 2 letter portrays Liberty as a company with a complete disregard for the law by referring to the New York State Cable Commission's finding that Liberty was operating a cable system without a franchise (even though New York City never had and does not now have a procedure for Liberty to obtain such a franchise) and that Liberty was operating without certain FCC microwave licenses (due to administrative oversight which Liberty will cure). Significantly, the letter fails to explain the complexity of these matters and the mitigating circumstances involved. Time Warner's assertions are more than attempts to tout its service; they are statements which are motivated by a malicious intent to undermine Liberty's business and interfere with Liberty's contracts with its current and potential subscribers.

F. Multimillion Dollar Lawsuits.

Time Warner has used the judicial process to intimidate potential Liberty customers. Specifically, Time Warner has filed numerous multimillion dollar lawsuits against MDU owners and others alleging that it has exclusive control over facilities within those

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[25] See Exhibit E at 3 following the heading "TECHNOLOGY"; see also Exhibit D at 2 following the heading "SIGNAL RELIABILITY".

[26] See Exhibit E at 4 following the heading "CHARACTER"; see also Exhibit D at 2 following the heading "EXPERIENCE".

MDUs.[27] In each of these cases, Liberty had approached the MDU owner and offered to provide its video services to MDU tenants.[28] As Exhibit G indicates, one result of this baseless litigation has been to delay the introduction of Liberty's service until the proceedings were resolved.

V. The Commission has Failed to Nurture Competition in the Video Marketplace.

Over the past year, the Commission has missed opportunities to take an aggressive, pro-competitive stand in many of its cable and video dialtone decisions.[29] While Liberty has committed substantial resources to actively participate in countless, and seemingly endless, Commission proceedings in order to assure that its perspective (which generally parallels pro-consumer interests) is taken into account, relief has not been forthcoming. The inability of the agency's processes to resolve these proceedings in a timely

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[27] Attached herewith as Exhibit G is an excerpt from an ex parte letter dated November 14, 1994 filed by Liberty in the cable inside wiring proceeding which describes six examples of such lawsuits. Recently, Cablevision used the same tactic and commenced litigation over the ownership of inside wiring at a condominium in New Jersey Superior Court. Cablevision of Riverview, Inc. v. Liberty Cable, Co., Inc., Riva Point Condominium Association, et al., Docket No. HUD-L-2415-95 (N.J. Super. Ct. Hudson Co.).

[28] As the Time Warner correspondence to Pat Ligori, a unit owner at Astor Terrace, and Ms. Ligori's letter to other residents of Astor Terrace attached herewith as Exhibit H indicate, potential Liberty subscribers are cognizant of the fact that Time Warner might take legal action against MDUs that allow Liberty to enter their premises. See Exhibit H at 3.

[29] Some groups have argued that the FCC's regulatory system is the single greatest obstacle to competition, lower prices, and new products and services. See generally The Progress & Freedom Foundation, "The Telecom Revolution -- An American Opportunity" (May 1995) ("PFF Report").

manner (not to mention the substantial legal costs associated with pursuing a resolution) does not promote either competition or investor confidence in alternative video technologies.

A few examples follow of the problems which Liberty and others have encountered at the Commission. The reader will recognize some of these examples from the preceding pages describing Time Warner's anticompetitive conduct; here, however, these examples illustrate how the lack of relief from the Commission has stunted the growth of a competitive video marketplace.

A. 18 GHz License Applications.

Liberty's efforts to compete against Time Warner have been severely curtailed by its inability to obtain new authorizations from the FCC for its microwave facilities. In this regard, Liberty takes full responsibility for its failure to comply with certain FCC regulations governing the provision of microwave services. However, regardless of Liberty's culpability, Time Warner has been able to game FCC procedures to take advantage of Liberty's failure to comply in order to bring Liberty to its knees and to deny consumers a choice of video programming providers.[30/] To make matters worse, Liberty has been unable to obtain any relief --

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[30/] See PFF Report at 10 ("Lastly, the FCC's regulatory process has lent itself to abuse by existing firms and special interests resistant to competition. Using regulatory processes against one's existing or potential competitors is a temptation few businesses and almost no trade association can resist. The perennial loser of this 'gaming' of the regulatory system has been the American public.")

including a grant of its STA requests -- from the Commission.[31/] The result, much to Time Warner's delight, is that Liberty is unable to effectively compete in the marketplace.

Liberty urges the Commission to adopt policies which ensure that procedural maneuverings like those engaged by Time Warner are not used to thwart competition. Any such policy would be consistent with the Commission's recent legislative proposal to Congress that fixed point-to-point microwave license applications no longer be subject to a 30-day public notice prior to grant.[32/] Specifically, in making this legislative proposal, the Commission explained that third-party objections to certain license applications (which are presently raised through petitions to deny) could adequately and more appropriately be handled under the Commission's existing procedures for seeking reconsideration (i.e., upon completion of the Commission's initial review and grant of the application). The Commission recognizes that there are benefits in allowing applicants to provide services while such third party oppositions are considered and that delays in granting such applications hinder the development of effective competition.

[31/] See PFF Report at 17 ("Across the board, the Commission's licensing process is characterized by procrastination, equivocation and seemingly endless delay. Unnecessary delay in issuing licenses ultimately found to be in the public interest imposes enormous costs on the industry and the national economy.")

[32/] Attached as Exhibit I is an excerpt from the Commission's 1995 Legislative Proposals (May 1995) regarding this matter.

B. Cable Inside Wiring.

The Commission's 1993 Home Wiring Order recognizes that the intent of the Act is to promote competition.[33] Specifically, the order states that the definition of cable home wiring was intended to "give alternate providers adequate access to the cable home wiring so that they may connect the wiring to their systems without disrupting the subscriber's premises".[34] However, the Commission's rules take almost no account of the MDU environment in which Liberty is attempting to compete. The definition of home wiring (for MDUs)[35] does not, in many cases, permit would-be competitors of cable to connect subscribers to their systems without destroying the subscriber's premises -- in many MDUs, the wiring is embedded in walls -- which is a significant disincentive for subscribers to switch to these providers.

On April 1, 1993, Liberty filed a Petition for Reconsideration and Clarification of the Home Wiring Order asking the Commission to modify its definition of home wiring and give alternate providers like Liberty easier access to inside wiring. Since filing its Petition, Liberty has met with Commission personnel, including Commissioners, over ten times and has filed reams of paper to

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[33] In the Matter of Implementation of the Cable Television Consumer Protection and Competition Act of 1992 Cable Home Wiring, MM Docket No. 92-260, 71 RR 2d 1214 (1993) ("Home Wiring Order").

[34] Id. at ¶¶ 11 - 12.

[35] See 47 C.F.R. §§ 76.5(ll) and (mm).

support its claims. Yet, Liberty continues to eagerly await Commission assistance in this area.[36]

The Commission's inaction in the inside wiring proceeding has been interpreted by some cable operators as a "green light" to continue blocking Liberty's efforts to gain access to subscribers who live in MDUs. While Liberty recognizes the complexity of this issue, Liberty hopes the Commission will find a way to resolve this critical issue expeditiously.

The cable inside wiring issue is not exclusively a "New York" matter. It effects the provision of video programming all across the country. Indeed, representatives of the wireless and private cable industries across the U.S. have expressed these same concerns. Moreover, two years ago, a Joint Petition for Rulemaking was filed by the United States Telephone Association ("USTA") and others proposing that the Commission adopt rules that give cable subscribers access to cable home wiring regardless of whether a subscriber terminates service.[37] If such a rule were adopted, the efforts of cable operators like Time Warner to complicate the switch to an alternate provider's service would likely cease. Again, almost two years later, the USTA petition remains pending.

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[36] See PFF Report at 9 which refers to the "wasteful delays" that seem to characterize numerous Commission proceedings.

[37] In the Matter of Joint Petition for Rulemaking to Establish Rules for Subscriber Access to Cable Home Wiring for the Delivery of Competing and Complimentary Video Services, RM No. 8380 released November 15, 1993.

C. Video Dialtone.

Last year, the Commission expressed optimism that VDT service providers would develop into viable competitors to incumbent cable operators.[38] Unfortunately, the extensive regulations imposed on VDT service providers have hindered the service's growth. For example, the Section 214 process is far too slow and cumbersome. Indeed, by the time the FCC approves a LEC's VDT plans, rapid technological changes often make the plans obsolete. The approval process also provides too many opportunities for the cable industry to "game" the system, adding further delays to the process. This burdensome regulatory scheme has rendered VDT much less attractive to LECs as a means for entering the video market.[39]

Liberty urges the Commission to act in a way that facilitates the development of VDT because Liberty plans to use NYNEX's VDT platform in New York City to enhance its competitive posture. As a VDT programmer, Liberty would be able to compete against Time Warner for customers in all households in the market, not just for customers residing in MDUs. Cable interests know that VDT threatens to eliminate their monopoly, however, and are doing everything within their power to prevent that from happening.

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[38] See <u>1994 Competition Report</u> at ¶ 104 ("These [214] applications, taken together, constitute a promising source of competition to cable operators for the multichannel distribution of video programming.")

[39] On June 27, 1995, Ameritech announced that it was abandoning the VDT approach and will follow the cable model to win local approval for building a five state digital video network and providing service.

To improve the chances for VDT's survival, and to increase competition in the market, the Commission must streamline its VDT regulatory structure so that needless impediments to constructing and operating a VDT system are eliminated, and so that VDT can compete with cable on a level playing field.

D. Bulk Rates.

The Commission adopted uniform rate regulations in an effort to eliminate selective predatory pricing by cable operators. However, the Commission's rate regulations provide little guidance to aggrieved parties to determine precisely when a cable operator is not offering uniform rates. For example, the rules do not specify a methodology for a cable operator (whose bulk rate practices are challenged) to justify its bulk rates. Specifically, the FCC's rules provide that a cable operator may establish "reasonable categories" for MDUs of differing size and differing contract durations if they are cost justified. Without any standards to make these determinations, these provisions are practically meaningless to anyone seeking to challenge a cable operator's rates.

More importantly, potential competitors have no clear instructions about how to seek Commission enforcement of its bulk rate rules. As a result, competing MVPDs have been given little practical relief or guidance. As Liberty suggested last year[40/], the Commission should provide clarification of how to enforce the

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[40/] See Comments of Liberty in CS Docket No. 94-48 at 20-21.

uniform rate requirement; the Commission should also create a specific enforcement mechanism (i.e., complaint procedure) to assure uniformity of rates.

The Commission is the only regulatory body that can provide Liberty and other MVPDs with relief from the anticompetitive effects of cable operator bulk rates. State and municipal agencies generally are not interested in promoting, or do not have a legislative directive or authority to promote, competition against the franchised cable companies and, therefore, cannot be expected to play any meaningful role in resolving the bulk rate issue.

VI. Other Factors Adversely Affecting the Growth of Competition.

Consumers who reside in MDUs often do not have any choice in who provides their video programming because MDU owners control the ability of any MVPD to install facilities in the common areas of the building. Indeed, some MDU owners do not always allow more than one MVPD to install equipment in their property and some owners enter into exclusive contracts with only one service provider. Such actions frustrate the development of free market competition.

A few states have nullified certain exclusive contracts by enacting statutes -- so-called mandatory access laws -- which give franchised cable companies access to MDUs. While these statutes eliminate exclusive contracts by non-cable MVPDs, they do not prohibit the franchised cable operators from entering into exclusive contracts. In this regard, the Commission has long recognized